Wolfe Electric Company, Inc. ***and*** **International Brotherhood of Electrical Workers Local No. 265, affiliated with International Brotherhood of Electrical Workers, AFL–CIO.** Case 17–CA–18957

October 1, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On April 15, 1998, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party filed an answering brief. On September 29, 2000, following an unpublished remand order by the Board the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order of the supplemental decision as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge's supplemental decision, as modified below, and orders that the Respondent, Wolfe Electrical Company, Inc., Lincoln, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.[4]

Substitute the following for paragraph 2(d).

(d) "Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Mary G. Taves, Esq., for the General Counsel.
William A. Harding, Esq. and *Margaret E. Stine, Esq*., for the Respondent.
Michael J. Stapp, Esq., for the Charging Party Union.

DECISION

ALBERT A. METZ, Administrative Law Judge.[1] This case involves issues of whether the Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[2]

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following findings of fact.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent is a nonunion electrical contractor in the Lincoln, Nebraska area. The Respondent's supervisory hierarchy includes President Richard L. Wolfe (Wolfe); and estimator/supervisors, Roger Hall and David Wolfe.

In the fall of 1995 the Respondent became aware of the Union's efforts to organize nonunion area electrical contractors by

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In its exceptions, the Respondent argues, inter alia, that its owner, Richard Wolfe's action against the applicants was motivated not by animus toward their union status, but by his anger against them for upsetting his wife, who was serving as the office receptionist during their initial visit to his shop. Mrs. Wolfe was terminally ill with cancer. While we have sympathy for the Wolfe's under these circumstances, we agree with the judge that the union applicants did nothing that would deprive them of the protection of the Act.

[3] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

[4] Par. 2(c) of the adopted Order provides that the nine discriminatees are to be made whole for any loss of earnings and benefits resulting from the discrimination against them, with that calculation of backpay to take "into consideration the issues set forth in *Dean General Contractors*, 285 NLRB 573 (1987)."

For the reasons set forth in his dissents in *Ferguson Electric Co*., 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001), and *Tualatin Electric*, 331 NLRB 36 (2000), Chairman Hurtgen disagrees with the application of *Dean*, at least as to "salt" situations. In the Chairman's view, the burden should be on the Union (and the General Counsel acting on its behalf) to come forward in compliance with evidence that the "salts" would have been hired by the Respondent on subsequent jobs had they not been unlawfully denied employment. See also, the dissent in *Kamtech, Inc.*, 333 NLRB 242, 243 fn. 7 (2001). Further, as to discriminatee Bill Roussan, a union organizer, Chairman Hurtgen would place the burden on the Union and General Counsel to establish in compliance how long Roussan would have remained in the Respondent's employ but for the Respondent's 8(a)(3) violation. *3D Enterprises Contracting Corp.*, 334 NLRB 57, 58–59 (2001) (dissenting opinion).

[1] This case was heard at Lincoln, Nebraska, on January 5–7, 1998. All dates refer to the time period April 1996 through January 1997 unless otherwise stated.

[2] 29 U.S.C. § 158 (a)(1) and (3).

attempting to get the contractors to hire its members (salting). As a result of his concern about the organizing, Wolfe held an employee meeting to discuss the matter. Based on the demeanor of the witnesses and the record as a whole, I find, Wolfe told his employees that because of the Union's organizing activities, he was going to quit advertising in the newspaper and hire his employees through word of mouth referrals. Wolfe said he would close business before he would allow the Union to organize the shop. Wolfe held another employee meeting in early 1996 where he told his employees that he was going to start using a hiring service to employ electricians. Wolfe explained that the hiring service was experienced at determining if applicants were union members.[3]

III. THE HIRING OF DOYLE HORWART

In late March 1996, Doyle Horwart, a union electrician, heard a radio advertisement by Advantage Personnel, an employment agency, seeking electricians. Horwart applied at Advantage and was interviewed by its representative, Tinka Williams. Williams referred Horwart for an interview at the Respondent's shop on April 3. Horwart interviewed with Wolfe and surreptitiously tape recorded their conversation. Wolfe said he normally hired employees on his own, but that, "it's gotten real scary with some people coming in from the union." Wolfe told Horwart that, "the last thing you need to have is somebody coming in saying I'm here and I'm going to unionize your shop." Wolfe said he had thought of not accepting any work or employment applications because of this problem, but Advantage Personnel offered to find people for him to avoid all of the problems. Wolfe told Horwart that his employees are instructed to inform individuals who came to the shop looking for work, that the company is not taking applications, and only if persons are referred from Advantage will he talk with them. Wolfe inquired about Horwart's union affiliation, "I don't know if you ever been a member of union or not." Horwart told Wolfe that he had been a member of a union many years ago. Wolfe continued by saying that, "And so all the contractors have to go through say like Advantage . . . so they don't get union people coming out."

After leaving his interview with Wolfe, Horwart again went to Advantage and met with Tinka Williams to discuss his interview. During the course of their conversation Williams asked Horwart, "Are you union?" Horwart said he was not. The Respondent denies that Advantage Personnel and Tinka Williams are its agents. The Respondent, however, employed Advantage to serve as its representative for the referral and hiring of workers. I find that Advantage and Williams were agents of the Respondent for this purpose and agents of the Respondent within the meaning of Section 2(13) of the Act. I further find that Williams was acting within the scope of her agency when she interrogated Horwart about his union membership. *Eldeco, Inc.,* 321 NLRB 857, 863 (1996); *Fed.R.Evid.* 801(d)(2)(D).

Horwart was assigned by Williams to start work with the Respondent on April 9. He was initially paid by Advantage but was entirely supervised by the Respondent. After 2 weeks, Horwart became Respondent's direct employee and was paid by the Respondent. Horwart continued to work for the Respondent until he was laid off on January 6, 1997, for lack of work.

On June 10 Horwart was engaged in a conversation with Supervisor Roger Hall. Horwart asked where he would be working next. Hall said Horwart would be going to the New Covenant Church jobsite and that there would be two electricians from ABC Electric there as well. Hall explained that ABC Electric is a union contractor and that Howart did not have to talk with the union electricians. Horwart was instructed to be courteous to them, but he was not to tell them about any work that the Respondent had. Hall also told Horwart that the Union had been "salting" some electrical shops recently and had succeeded in organizing one shop in Lincoln.

On June 20 Horwart had a conversation with Wolfe who told him that a journeyman electrician and an apprentice had just quit. Wolfe stated he needed six more workers immediately for some large jobs. Wolfe asked Horwart if he knew of any persons who might be interested in working for the Respondent. Shortly thereafter, Horwart told Union Business Agent Bill Roussan, of this conversation.

IV. JULY 8—UNION MEMBERS SEEK WORK

A. First Union Visit

On the morning of July 8, union members Jerry Chorowicz, David Cousins, Glenn Isaacs, Roy Lamb II, John Markey, Fred Munch, Bill Pilant, Samuel Pulec, and Bill Roussan went to the Respondent's office to apply for work. Some of the men were wearing union insignia on their clothing. Karen Wolfe, wife of the Respondent's owner, Richard Wolfe, was in the office and spoke to the men. The men made tape recordings of the brief conversation that ensued. They also had a video camera with them. The men identified themselves as being from the Union and asked about work. Karen Wolfe told them they would have to speak to her husband, that she would not take applications without Wolfe being present. She told the group that Wolfe would be back in about an hour. Roussan asked how Respondent normally hired employees. Karen Wolfe said the Respondent used an employment agency. Munch asked if there was a particular agency where they should apply. Karen Wolfe told the group they would have to speak to Wolfe about that. Roussan presented a list of the employees who were in the group. Karen Wolfe told the group she would let Wolfe know they had been there. Roussan thanked Karen Wolfe for her time. Karen Wolfe said "You're very welcome," and the group left the building.

Although not apparent to the union men, Karen Wolfe was unfortunately terminally ill at the time. After the men left, Karen Wolfe became upset and called her husband to return to the office. Wolfe found his wife in an anxious state and he became angry by what he considered the inappropriate conduct of the union men, which unexpectedly distressed his wife. Wolfe related that, "She told me eight [sic] Union guys had just been in there . . . they had a video camera. And she was extremely scared and . . . worried that she had said something that would cause us to be sued."

[3] The original charge in this case was filed on December 23, 1996. The Act's Sec. 10(b) statute of limitations period began June 23, 1996.

B. Second Union Visit

Later in the morning five of the union men returned to the Respondent's office to talk to Richard Wolfe. Again the encounter was tape recorded by the Union. Wolfe berated the men for upsetting his wife and told them of her illness. The men apologized for any upset they had caused Karen Wolfe and pointed out that their meeting had been cordial. Wolfe said that he was not hiring and not accepting applications. Wolfe told the men to leave.

The men were never hired nor considered for employment thereafter by the Respondent. Wolfe testified that he perceived the treatment of his wife by the union applicants to have been so unacceptable that he would not consider any of them for employment regardless of their qualifications.

C. Subsequent Communications Between the Parties

After July 8 the Union sent Wolfe several letters and faxes expressing the union workers' continued interest in employment with his company. The union made clear that the men would accept any available positions as journeymen or apprentices. Wolfe refused to sign for the letters but did receive the faxes. On September 12 Wolfe sent a letter to the Union stating that the Respondent was not hiring journeyman electricians, nor was it taking applications on July 8, 1996. The Respondent did hire some field employees after July 8.

V. ANALYSIS OF THE HIRING ISSUE

The Government alleges the Respondent committed an unfair labor practice when it refused to hire, or consider for hire, the July 8 union applicants. The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation, are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). "The elements of a discriminatory refusal-to-hire case are the employment application . . . the refusal to hire . . . a showing that [the applicant] was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus." *Big E's Foodland, Inc.,* 242 NLRB 963, 968 (1979).

On July 8 the Respondent was aware of the men's union affiliation because they so identified themselves, wore union insignia and their list of addresses was on union stationary. The timing of Wolfe's actions in rejecting them for employment was immediate to their appearance at his shop. The Respondent's animus towards the Union is shown by such conduct as Wolfe telling his employees he would no longer advertise in the paper, that he would close the business rather than permit it to become union organized, and that he would use an employment agency to screen out union applicants. Respondent's animus is also demonstrated by Tinka Williams' interrogation of Doyle Horwart as to whether he was a union member, as well other conduct by the Respondent described below.

The nine union members who appeared to apply for work on July 8 were engaged in protected, concerted activity. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). They did not engage in any discourteous conduct when they were in the Respondent's office. The men did not anticipate the distress that resulted to Karen Wolfe. Wolfe testified that the reason his wife was upset was her fear she had said something that could result in a lawsuit. Nothing the union members did on July 8 removed them from the protection afforded them by Section 7 of the Act, including the fact that they had a video camera.[4]

The Respondent's brief argues that the sole reason the Respondent refused to hire, or consider the union men for hire, was Wolfe's personal animosity towards them for the adverse effect their visit caused his wife. This defense does not meet the Respondent's *Wright Line* burden of showing that it would not have considered for hire or employed the men regardless of their protected concerted activity. The fact is the Respondent rejected the men for engaging in noncoercive protected activity, i.e., concertedly seeking employment. Wolfe's personal feelings of how they conducted that protected activity is not a defense to the unfair labor practice charge. I further find that Wolfe's anger was used by the Respondent as a convenient pretextual excuse to preclude it having to consider the union men for employment. *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982). The refusal of the Respondent to consider for hire or to hire these men because of their protected activity is found to be a violation of Section 8(a)(1) and (3) of the Act. *3E Co.*, 322 NLRB 1058 (1997).

VI. JULY 9 EMPLOYEE MEETING

On July 9 Richard Wolfe held a meeting with his electricians. He expressed his anger against the union men that had visited the office the previous day. According to Horwart, Wolfe said that if any of the men present wanted to work union they could get out now. Wolfe also told the employees that the Union can send representatives to their jobs. If they saw any such representatives the employees were to notify their supervisors. He mentioned that the union organizers frequently wore red apparel. Wolfe said that he would fight the Union to the end and as well as anyone who treated his wife "that way." Wolfe testified he was very angry with the men and referred to them as "pricks." He denied telling the employees it would be futile to select the Union to represent them, to report union contact to the Respondent, or that he told employees interested in the Union that they could go out the door. He did recall telling employees he had no animosity towards the Union and the employees could be in the Union if they wanted to be, but he personally wanted nothing to do with anybody that would intimidate a woman or intimidate someone with a video cam-

[4] Karen Wolfe said nothing to the union men about any prohibition against using a video camera on the Respondent's premises.

era. Several employees testified to their recollections of the meeting. Each was less definite in their recollection of events than Horwart and Wolfe.

Horwart's demeanor and detailed testimony of this meeting were persuasive. He appeared to be a careful analyst of what he observed. Wolfe was admittedly very agitated at the union men during the meeting and said he would not deal with such persons. The other witnesses had only fragmentary recollections of the meeting and their testimony of the event was not valuable in assessing what was actually said. Considering the demeanor of the witnesses and the record as a whole, I credit Howart's version of what was said at this meeting. I find that Wolfe's statements to the employees that, (1) they could go out the door if they supported the Union, (2) he would fight the Union, and (3) the employees should report any union contact, threatened, restrained, and coerced the employees in violation of Section 8(a)(1) of the Act.

VII. CHANGES IN HIRING PROCEDURES

Shortly after the July 8 visit by the union men the Respondent posted a sign on its office telling the public that it was not accepting any employment applications. As discussed below, on July 22, Wolfe asked some of his electricians if they knew of any workers he could hire. Wolfe said he would take down the "no applications" sign for 5 minutes so they could come in and apply. Based on the record as a whole, I find that the Respondent posted the sign about not accepting applications in an effort to keep union employees from applying for employment. The discriminatory posting of this sign is found to be a violation of Section 8(a)(1) and (3) of the Act. *Casey Electric,* 313 NLRB 774, 775 (1994).

VIII. JULY 22 REMARKS CONCERNING FUTILITY AND SOLVING EMPLOYEE PROBLEMS

On July 22 Wolfe called a meeting of his electricians and apprentices to inform them that he had received a certified letter from the Union. He said he had refused delivery of the letter and he would fight the Union to the end, and in court if necessary. Wolfe also said that an electrician and an apprentice had suddenly quit that day. He asked the men what was causing them stress on the job. Wolfe told them his door was always open and he would try to help them with any problems. Wolfe and the employees then discussed various problems. The meeting concluded and several of the employees and Wolfe gravitated to the reception area of the office. At that point Wolfe said that he did not want to lose any more workers, and asked the employees if any of them knew of electricians he could hire to let him know and if his attorneys permitted it, he would take the "no applications" sign down for 5 minutes so they could come in and apply.

Wolfe's statements about fighting the Union to the end is a message to the employees that supporting the Union would be a futility. In the same context seeking out employee concerns and offering to rectify their problems also conveys to the employees that they do not need union representation. *Capitol EMI Music*, 311 NLRB 997, 1007 (1993); and *Family Foods*, 300 NLRB 649, 663 (1990). I find that both the "fight to the end" remark as well as soliciting and offering to correct employee concerns in this circumstance are violations of Section 8(a)(1) of the Act.

IX. SEPTEMBER 13

On September 13 Supervisor Roger Hall had a conversation with Horwart and employee Mike Bevins. Hall asked Bevins if he was registered with the State as an apprentice. Bevins said he was registered and ready to take the journeyman electrician's license test. Hall said that was good because the Respondent could no longer hire journeymen because of the Union, and that all journeymen would have to come from within the company. I find that Hall's statement that the Respondent could not hire because of the Union is a violation of Section 8(a)(1) of the Act. *Family Foods,* supra at 660.

X. NOVEMBER 1 THREATS OF ECONOMIC CONSEQUENCES

On November 1 Wolfe held an employee meeting with his attorney also present. Wolfe read a prepared statement to the employees followed by a question and answer period. Horwart recalled that Wolfe said during this question period that if the employees selected the Union that his customers would no longer use the Respondent. Wolfe also said that he had to close the book on growth because of the Union and that he could not afford to pay union benefits and remain competitive. Wolfe denied making any threats but conceded he has told the employees he had to stay competitive. Other employees testified that they did not recall attending any meeting where Wolfe made threats to employees.

Supervisor Hall was placed at this meeting by Horwart. Hall was later called as the Respondent's witness but was not asked to deny his attendance at the meeting or explain what Wolfe might have said. The Respondent's attorney was not called as a witness. Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence is unfavorable to the party. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Such an inference is appropriate in this case. I find that had Hall and the Respondent's attorney testified concerning this meeting their testimony would have been contrary to Wolfe's denial of making any threatening statements. *International Automated Machines*, 285 NLRB 1122–1123 (1987). Howart's testimony was convincing as was his demeanor. I do not credit Wolfe's denial of making any such threats. I find that Wolfe's threats of adverse economic consequences made to employees in this meeting are violations of Section 8(a)(1) of the Act. *Weldun International*, 321 NLRB 733, 746–747 (1996); and *299 Lincoln Street, Inc.,* 292 NLRB 172, 173–174 (1988).

XI. DECEMBER 23

A. Howart Discloses Union Activity

On December 23 Horwart gave the Respondent a letter from the Union that explained he was a union organizer. He also told Supervisor David Wolfe that he was on restricted duty because of a heart problem. Horwart supported this claim with a physician's letter, and said he was going to be off work on December 26 to have a heart catheterization test. David Wolfe

told him to keep the Respondent informed as to how the tests turned out.

B. No-Solicitation Rule and Trespass Threat

That afternoon Wolfe called an employee meeting. Horwart returned to the office and was ushered into Wolfe's office before the meeting. Present were Wolfe, Hall, David Wolfe, and the Respondent's attorney. Horwart was given a copy of Respondent's newly published no-solicitation/no-distribution rule and told to sign it to affirm he had received a copy. Horwart signed and Wolfe told him that he would protect Horwart's rights. Horwart said he would do the same for the Respondent's rights. They then went into the employee meeting.

At the meeting Wolfe also gave the employees copies of the new no-solicitation rule but they were not required to sign anything confirming they had been given the rule. Wolfe passed out copies of Horwart's letter announcing his union organizing efforts. Wolfe told the employees that he felt Horwart was a party to the harassment of contractors, and noted that "union thugs" had been handbilling in front of the shop that morning. Wolfe called Horwart a sneak and told the employees they did not have to talk with the Union if they did not want to. Wolfe accused Horwart of timing his announcement to ruin Christmas. Wolfe concluded by stating that anyone who had their name on printed literature found on the premises would have trespass charges filed against them.

Wolfe's remarks about filing trespass charges against anyone whose name appeared on handouts did not attempt to distinguish lawfully distributed materials. I find that this general threat is a violation of Section 8(a)(1) of the Act.

The no-solicitation/no-distribution rule issued on December 23 was facially invalid. It defined worktime as including meal and break periods. The rule also prohibited distribution of literature in public areas of company property. The Respondent had not had any such rule before the union activity at the shop. The rule was implemented the day Horwart identified himself as a union organizer. The Respondent offered no justification for creating the rule. The Respondent corrected the rule on December 26 to the extent that worktime was redefined not to include meals and breaks. Finally, on February 12 the rule was again revised to eliminate the prohibition against distributions in public areas. The record shows that the rule was originally promulgated to meet Horwart and the Union's organizational efforts. Such motivation in establishing a no-solicitation rule is a violation of the Act. *Harry M. Stevens Services,* 277 NLRB 276 (1985). In addition, the language of the first two versions of the rule was unlawful in its overbroad prohibitions. I find that the promulgation and maintenance of the no-solicitation rule is a violation of Section 8(a)(1) of the Act. *Cannondale Corp.,* 310 NLRB 845, 849 (1993); *Mack's Supermarkets***,** 288 NLRB 1082, 1096–1097 (1988); and *Times Publishing Co.*, 240 NLRB 1158 (1979).

XII. HORWART'S WARNINGS

On December 26 Howart had his heart catheterization test. He was admitted to the hospital the following morning and underwent angioplasty surgery. On December 30 Horwart telephoned Wolfe to report what had happened to him. Wolfe informed Horwart that he was receiving a written reprimand for failing to call in on Friday, December 27, and Monday, December 30.

A. December 31 Notice

On December 31 the Respondent prepared a written warning for Horwart's failure to call the Respondent to report his absence from work. When Wolfe learned further details of Horwart's medical problems, however, he rescinded this written disciplinary notice. The Government alleges that the discipline notice was discriminatorily issued to Horwart. I find that the admitted failure of Horwart to inform the Respondent of his absence was justification for the Respondent to issue the short-lived disciplinary notice to him. I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by this conduct.

B. January 6 Notice

Horwart returned to work on January 6. On that day he was notified that he was being laid off because of lack of work. He was given four sheets of paper at this time. Two of the papers stated he had been reminded on several occasions that he was to turn in reports for extra work that he had done on a particular job. (GC Exhs. 21, p. 2 and 42.) The Government asserts that these two notices about overdue paperwork were unlawful disciplinary warnings based on Horwart's union activity. The Respondent is unable to bill customers unless this paper work is on file. Howart testified that he had not been reminded to turn in this billing paperwork. Nonetheless, he admitted he had "overlooked" filling out the reports.

I find that, whether considered disciplinary or not, the Respondent was justified in requiring Horwart to complete his paperwork. Customer billing depended on such documentation and Howart was being laid off that very day. The Respondent has demonstrated that the notice would have been given Horwart regardless of his union activities. I find the Respondent's action in this regard did not violate Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Wolfe Electric Company, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers Local 265, affiliated with International Brotherhood of Electrical Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Respondent, Wolfe Electric Company, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or consider for hire employees because of their union membership or activities.

(b) Threatening employees with discharge if they support the Union; implying to employees that it would be futile to support the Union; telling employees that they should report contact with the Union; soliciting and offering to correct employee grievances; and stating the Respondent could not hire journeymen because of the Union.

(c) Restricting or changing its employment practices in order to discriminatorily preclude the hiring of union members or supporters.

(d) Making threats to employees of adverse economic consequences if they select union representation.

(e) Promulgating, maintaining, or enforcing no-solicitation and no-distribution rules, or any other rules, for the purpose of discouraging union activities.

(f) Threatening to file trespass charges against anyone whose name appears on handouts found on the Respondent's premises.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, hire or consider for employment Jerry Chorowicz, David Cousins, Glenn Isaacs, Roy Lamb II, John Markey, Fred Munch, Bill Pilant, Samuel Pulec, and Bill Roussan to the same or substantially equivalent positions for which they applied, without prejudice to any seniority or other rights and privileges to which they would be entitled in the absence of the Respondent's discrimination. Final determination of job availability shall be made in the compliance phase of this proceeding.

(b) Make Jerry Chorowicz, David Cousins, Glenn Isaacs, Roy Lamb II, John Markey, Fred Munch, Bill Pilant, Samuel Pulec, and Bill Roussan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Final determination of backpay liability shall be made in the compliance phase of this proceeding. All reinstatement and backpay recommendations are subject to the procedures discussed in *B E & K Construction Co.,* 321 NLRB 561 (1996); and *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995). Because Respondent is engaged in the construction industry, I shall further recommend, in accord with *Dean General Contractors*, 285 NLRB 573 (1987), that the Board leave to the compliance stage of this proceeding the determination of whether the discriminatees to be offered employment would have continued in the Respondent's employment after completion of the projects for which they would have been hired. *Walz Masonry, Inc.,* 323 NLRB 1258 (1997).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire, or consider for hire, of Jerry Chorowicz, David Cousins, Glenn Isaacs, Roy Lamb II, John Markey, Fred Munch, Bill Pilant, Samuel Pulec, and Bill Roussan and within 3 days thereafter notify these employees in writing that this has been done and that they will be considered for hire in a nondiscriminatory manner.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Rescind the no-solicitation/no-distribution rule and notify all employees this has been done.

(f) Within 14 days after service by the Region, post at its facility in Lincoln, Nebraska, copies of the attached notice marked "Appendix."[6] Copies of the notice on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees, former employees employed by the Respondent at any time since July 8, 1996, and the above-named discriminatees. *Excel Containers, Inc.,* 325 NLRB 17 (1997).

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire, or to consider for hire, employees because of their union membership or activities.

WE WILL NOT threaten employees with discharge if they support the International Brotherhood of Electrical Workers Local No. 265, affiliated with International Brotherhood of Electrical Workers, AFL–CIO or any other labor organization; imply to employees that it would be futile to support the Union; tell employees that they should report contact with the Union; solicit and offer to correct employee grievances; or tell employees that we cannot hire journeymen because of the Union.

WE WILL NOT restrict or change our employment practices in order to discriminatorily preclude the hiring of union members or supporters.

WE WILL NOT threaten our employees with adverse economic consequences if they want to select union representation.

WE WILL NOT promulgate, maintain, or enforce any no-solicitation and no-distribution rules, or any other rules, for the purpose of discouraging union activities.

WE WILL NOT threaten to file trespass charges against anyone whose name appears on handouts found on our premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, hire or consider for employment Jerry Chorowicz, David Cousins, Glenn Isaacs, Roy Lamb II, John Markey, Fred Munch, Bill Pilant, Samuel Pulec, and Bill Roussan to the same or substantially equivalent positions for which they applied, without prejudice to any seniority or other rights and privileges to which they would be entitled in the absence of the Respondent's discrimination.

WE WILL make Jerry Chorowicz, David Cousins, Glenn Isaacs, Roy Lamb II, John Markey, Fred Munch, Bill Pilant, Samuel Pulec, and Bill Roussan whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire, or consider for hire, of Jerry Chorowicz, David Cousins, Glenn Isaacs, Roy Lamb II, John Markey, Fred Munch, Bill Pilant, Samuel Pulec, and Bill Roussan and within 3 days thereafter notify these employees in writing that this has been done and that they will be considered for hire in a nondiscriminatory manner.

WE WILL rescind our no-solicitation/no-distribution rule.

WOLFE ELECTRIC COMPANY, INC.

Mary G. Taves, Esq., for the General Counsel.
William A. Harding, Esq. and *Dana M. Van Beek, Esq.,* for the Respondent.
Michael J. Stapp, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

ALBERT A. METZ, Administrative Law Judge. Subsequent to the original decision in this case the Board announced its decision in *FES,* 331 NLRB 9 (2000). By order dated June 7, 2000, the Board remanded the present case for consideration in light of the principles announced in *FES*. The parties have filed briefs setting forth their positions on the remand issues.

All parties agree that the record is sufficient to decide the remand issue. I concur. The Respondent argues that the General Counsel has failed to meet its burden of proving that it had any job openings on July 8, 1996, and the complaint should be dismissed. Counsel for the General Counsel and the Charging Party assert the record establishes that under the Board's reasoning in *FES*, Respondent unlawfully failed to hire employees Samuel Pulec, Jerry Chorowicz, Glenn Issacs, John Markey, David Cousins, Roy Lamb II, Fred Munch, Bill Pilant, and Bill Roussan. It is further argued that they are entitled to instatement and to be made whole.

In *FES*, the Board addressed the standards for proving refusal-to-hire and refusal-to-consider cases. In a refusal-to-hire case, the Board held that the General Counsel must show (1) that the Respondent was hiring, or had concrete plants to hire, at the time of the alleged unlawful conduct; (2) that the applicants had the experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer did not adhere uniformly to such requirements, or that the requirements were themselves pretextual; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the employer to show that it would not have hired the union applicants even in the absence of their union activity or affiliation. If the employer asserts that the applicants were not qualified for the positions it was filling, it is the employer's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others who were hired had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity.

The Board reasoned that in a refusal-to-hire case, the proof of the availability of openings could not be deferred to the compliance stage of the proceeding. In order to find a refusal-to-hire violation warranting a cease-and-desist order, the General Counsel has only to show that Respondent had at least one actual job opening, regardless of the number of applicants. However, if the General Counsel seeks an affirmative backpay and instatement order, he must show, at the hearing on the merits, the number of openings that were available, that the applicants were qualified for the openings, and that the animus of the Respondent toward the Union contributed to the decision not the hire the applicants for the openings. If there were more individuals who Respondent failed to hire than job openings, the Board found that the compliance proceeding would be used to determine which of the applicants would have been hired for each of the openings, and would therefore be entitled to backpay and a job placement, rather than just a remedy for a refusal to consider. If, on the other hand, the number of openings ex-

ceeded the number of applicants, the compliance proceeding would be used to establish which of the applicants would have been hired for which of the openings.

The record establishes that on June 20, 1996, Respondent's owner, Dick Wolfe, had a discussion with employee Doyle Horwart about hiring electrical employees. Wolfe told Horwart and another employee that he needed to hire six employees and asked for their assistance in recommending anyone they knew for employment. Wolfe reported that he had over a million dollars' worth of commercial work. Wolfe said that because of all of the work, he needed employees badly and would even take kids if they knew of anyone. Wolfe reported that he had a shortage of journeymen electricians. It was as a result of this conversation that Horwart reported Respondent's need for employees to Union Organizer Bill Roussan.

Roussan and eight other union men then attempted to apply for employment with the Respondent on July 8, 1996. The nine individuals that went to the Respondent's facility on the July 8 were journeymen electricians, Bill Roussan, Fred Munch, Glen Isaac, Roy Lamb II, Sam Pulec, Jerry Chorowicz, Dave Cousins, and John Markey. Bill Pilant, a union journeyman ironworker and certified welder, also went with them to apply for work. As fully set forth in the original decision, all of these men were discriminatorily rebuffed in that effort by Wolfe who told them he was not hiring. Wolfe subsequently posted a sign at his facility stating that the Respondent was not taking applications. In an employee meeting on July 22, however, Wolfe asked his workers to let him know of any potential employees and he would take the sign down for 5 minutes so they could apply.

Record evidence shows that the Respondent did hire at least 16 people after the union applicants applied. Employee Doyle Horwart's testimony confirmed that the Respondent hired employees after the union applicants attempted to apply. I credit Horwart's testimony in this regard. Additionally, Wolfe testified that because of his bitterness against the union applicants for the manner in which he perceived they applied for employment, he was not going to hire any of them regardless of job openings.

Based on the record evidence I find that the Respondent did have concrete plans to hire applicants on July 8, 1996, and that the General Counsel has proven that approximately 16 employees were hired following that date. I further find that the Respondent discriminatorily rejected the nine union applicants because of their union membership and activities and changed its public hiring posture to avoid hiring union applicants. The Respondent, when it subsequently hired workers, unlawfully refused to hire the discriminatees because of their union status.

Wolfe testified that he did not care what qualifications the Union applicants had, as he would not hire them if they were the last electricians on earth. The Respondent did not prove that any of the union applicants were not qualified to fill available positions. I find that the General Counsel proved that of the above-noted union applicants, eight were journeymen electricians, well qualified for hire by the Respondent. The ninth individual, Bill Pilant, is a journeyman ironworker and certified welder. The record establishes that Wolfe stated he would hire inexperienced workers to meet his needs and did subsequently hire apprentices. I find, therefore, that Pilant is qualified for employment positions other than journeyman electrician.

I affirm my original decision and find that the Respondent has failed to establish that it would not have hired the discriminatees even in the absence of their union activity or affiliation. I find that the Respondent unlawfully refused to hire all of the named discriminatees in violation of Section 8(a)(1) and (3) of the Act. I further find that, under the *FES* standard, all nine discriminatees are entitled to instatement and backpay. Any disputes about what positions each employee was entitled to fill may be resolved at the compliance stage.

CONCLUSIONS OF LAW

1. The Respondent, Wolfe Electric Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Electrical Workers Local No. 265, affiliated with International Brotherhood of Electrical Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as specified herein and in the original decision.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Wolfe Electric Company, Inc. Lincoln, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire Samuel Pulec, Jerry Chorowicz, Glenn Issacs, John Markey, David Cousins, Roy Lamb II, Fred Munch, Bill Pilant, and Bill Roussan, or any other employee, because of their union membership or activities.

(b) Threatening employees with discharge if they support the Union; implying to employees that it would be futile to support the Union; telling employees that they should report contact with the Union; soliciting and offering to correct employee grievances in order to interfere with union activity; and stating the Respondent could not hire journeymen because of the Union.

(c) Restricting or changing its employment practices in order to discriminatorily preclude the hiring of union members or supporters.

(d) Making threats to employees of adverse economic consequences if they select union representation.

(e) Promulgating, maintaining, or enforcing no-solicitation and no-distribution rules, or any other rules, for the purpose of discouraging union activities.

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Threatening to file trespass charges against anyone whose name appears on handouts found on the Respondent's premises.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Samuel Pulec, Jerry Chorowicz, Glenn Issacs, John Markey, David Cousins, Roy Lamb II, Fred Munch, Bill Pilant, and Bill Roussan immediate instatement to the positions for which they applied, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make Samuel Pulec, Jerry Chorowicz, Glenn Issacs, John Markey, David Cousins, Roy Lamb II, Fred Munch, Bill Pilant, and Bill Roussan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As the Respondent is engaged in the construction industry, make whole calculations shall take into consideration the issues set forth in *Dean General Contractors*, 285 NLRB 573 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful refusal to hire Samuel Pulec, Jerry Chorowicz, Glenn Issacs, John Markey, David Cousins, Roy Lamb II, Fred Munch, Bill Pilant, and Bill Roussan, and, within 3 days thereafter notify these employees in writing that this has been done and that they will be hired in a nondiscriminatory manner.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1135 (1999).

(e) Rescind the no-solicitation/no-distribution rule and notify all employees this has been done.

(f) Within 14 days after service by the Region, post at its facility in Lincoln, Nebraska, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 8, 1996. *Excel Container, Inc.,* 325 NLRB 17 (1997).

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire Samuel Pulec, Jerry Chorowicz, Glenn Issacs, John Markey, David Cousins, Roy Lamb II, Fred Munch, Bill Pilant, and Bill Roussan, or any other employee, because of their union membership or activities on behalf of, the International Brotherhood of Electrical Workers, or any other labor organization.

WE WILL NOT threaten employees with discharge if they support the Union; imply to employees that it would be futile to support the Union; tell employees that they should report contact with the Union; solicit, and offer to correct, employee grievances in order to interfere with union activity; or state that we could not hire journeymen because of the Union.

WE WILL NOT restrict or change our employment practices in order to discriminatorily preclude the hiring of union members or supporters.

WE WILL NOT make threats to employees of adverse economic consequences if they select union representation.

WE WILL NOT promulgate, maintain or enforce no solicitation and no distribution rules, or any other rules, for the purpose of discouraging union activities.

WE WILL NOT threaten to file trespass charges against anyone whose name appears on handouts found on our premises.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Samuel Pulec, Jerry Chorowicz, Glenn Issacs, John Markey, David Cousins, Roy Lamb II, Fred Munch, Bill Pilant, and Bill Roussan immediate instatement to the positions for which they applied, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Samuel Pulec, Jerry Chorowicz, Glenn Issacs, John Markey, David Cousins, Roy Lamb II, Fred Munch, Bill Pilant, and Bill Roussan whole for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to our unlawful refusal to hire Samuel Pulec, Jerry Chorowicz, Glenn Issacs, John Markey, David Cousins, Roy Lamb II, Fred Munch, Bill Pilant, and Bill Roussan, and, WE WILL, within 3 days thereafter notify these employees in writing that this has been done and that they will be hired in a nondiscriminatory manner.

WE WILL rescind our no-solicitation/no-distribution rule and notify all employees this has been done.

WOLFE ELECTRIC COMPANY, INC.